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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO SILVA,

Defendant and Appellant.

G050973

(Super. Ct. No. P-01296)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Craig E. Robison, Judge. (Retired Judge of the Orange Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Defendant Ernesto Silva appeals from a postjudgment order reinstating his parole with an additional term of 105 days in county jail. The order was based on defendant's admission he violated the terms of his parole.

The petition charging defendant with violating parole was filed by the Division of Parole Operations of the Department of Corrections and Rehabilitation (the Department) pursuant to Penal Code section 3000.08, subdivision (a). (All further statutory references are to the Penal Code.) Before admitting the parole violation defendant moved to dismiss the petition, arguing he was subject to supervision by the county under the Postrelease Community Supervision Act of 2011 (§ 3450 et seq.; PRCs), and therefore the Department lacked authority to supervise his parole. Based on the foregoing argument, defendant requested, and the trial court issued, a certificate of probable cause finding it presented a reasonable jurisdictional ground for appellate review of the legality of the parole violation proceeding. (§ 1237.5.)

We appointed counsel to represent defendant on appeal. Counsel filed a brief that set forth the facts of the case and, while not arguing against his client, advised the court he found no issues to argue on defendant's behalf. Defendant was given 30 days to file written argument on his own behalf. The 30-day period has passed, and we have received no communication from defendant. Pursuant to *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] and *People v. Wende* (1979) 25 Cal.3d 436, we have examined the record and agree it presents no arguably meritorious issues.

FACTS AND PROCEDURAL BACKGROUND

In 2013, defendant, who had a prior conviction for indecent exposure that obligated him to register as a sex offender (§§ 314, 290), was convicted of possession of a controlled substance. Initially he received probation, but after violating its terms, the

trial court sentenced him to two years in state prison. In February 2014, he was released from prison and placed on parole.

On April 22, the Department arrested defendant for failing to attend a group therapy meeting for a sex offender outpatient treatment program, using heroin, and being under the influence of that drug. The Department filed a petition to revoke his parole on May 1. The factual basis for the petition was contained in an attached parole violation report. That report included an allegation that the Static 99 risk assessment tool had identified defendant as a high risk sex offender. Arraignment on the petition was scheduled for May 8.

At the time of his arraignment, defendant filed two pleadings; a demurrer to the petition and a motion to dismiss it. The demurrer challenged the validity of the petition on the ground it failed to allege the Department had considered lesser remedial sanctions before seeking to revoke defendant's parole. At the May 8 hearing, the Department filed an amendment to the petition alleging compliance with the consideration of remedial sanctions requirement. The trial court overruled the demurrer.

Defendant's motion to dismiss attacked the Department's authority to supervise his parole. He asserted section 3000.08, subdivision (a) limited the Department's parole supervision authority to persons convicted of a either serious or violent felony, third strike parolees, high risk sex offenders, or anyone requiring state hospitalization. Claiming he did not fall within any of these categories, defendant argued that he was subject to supervision by local authorities under the PRCS. (§ 3000.08, subd. (b).) The prosecution opposed the motion, arguing that under section 3000.08, subdivision (1), defendant's motion was untimely because he had been under the Department's supervision for over 60 days by the time the petition for parole revocation was filed. The court denied the motion. Thereafter, defendant admitted violating parole after he was advised of and waived his rights. The court found a factual basis existed for the admission, declared defendant violated his parole, and reinstated it on condition he

serve 90 days in county jail with credit for 62 days of time served. Defendant did not appeal from this ruling.

On July 30, defendant was again arrested for failing to comply with the terms of his parole by not participating in his sex offender outpatient treatment program, using heroin, and failing to follow his parole officer's instructions. The Department filed a second petition to revoke his parole on August 8. Defendant again moved to dismiss the petition on the same ground as before; the Department lacked authority to supervise his parole. This motion additionally requested the court reconsider the merits of the original dismissal motion, claiming it had been timely filed because he was not under the Department's supervision for over 60 days before his initial arrest. The prosecution opposed the motion citing the Static 99 sex offender risk assessment allegation and its prior lack of timeliness argument.

The court denied the motion. Thereafter, defendant agreed to admit the second petition's allegations, was advised of his rights, and waived them. The court made findings of a factual basis for the admission and violation of parole, and ordered it reinstated on condition he serve 105 days in county jail with credit for 74 days of time served.

DISCUSSION

This appeal is from an order reinstating defendant's parole based on his admission that he violated the terms of his parole. A defendant may appeal in this circumstance "only on grounds going to the legality of the proceedings." (*People v. Palmer* (2013) 58 Cal.4th 110, 114.) Here, in compliance with section 1237.5, the trial court issued a certificate of probable cause based on defendant's statement that the Department's asserted lack of authority to supervise his parole pursuant to section

3000.08 constituted a “reasonable . . . jurisdictional . . . ground[] going to the legality of the proceedings.” (§ 1237.5, subd. (a).)

Since the trial court’s rulings in this case, we have recognized certain limitations on the Department’s supervision of parolees. In *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, we held constitutional due process principles and the changes wrought by the 2011 legislation “establish[ed] a uniform process for revocation of parole, probation, and postrelease supervision of most felons” (*id.* at p. 651) that “entitled [a parolee] to arraignment within 10 days of an arrest for a parole violation, a probable cause hearing within 15 days of the arrest, and a final hearing within 45 days of the arrest” (*id.* at pp. 643, 663-664). In *People v. Osorio* (2015) 235 Cal.App.4th 1408, we further held section 3000.08, subdivision (f) and California Rules of Court, rule 4.541(e) “requires the Department to include in the report ‘the reasons for that agency’s determination that intermediate sanctions without court intervention . . . are inappropriate responses to the alleged [parole] violations.’” (*People v. Osorio, supra*, 235 Cal.App.4th at p. 1413.)

Here, defendant did not challenge either petition on the ground the delay between his arrest and the filing and adjudication of the petition violated due process. While he did demur to the original petition on the ground it failed to allege consideration of lesser sanctions, the Department cured the defect at the time of the arraignment. In any event, defendant did not appeal from the first parole revocation order, and we have held that under the procedures implemented by the realignment legislation a parole revocation order is now appealable as a postjudgment order affecting the defendant’s substantial rights. (*People v. Osorio, supra*, 235 Cal.App.4th at p. 1412; § 1237, subd. (b).) Defendant did not appeal from the initial parole revocation order and it is now final and cannot be attacked in this appeal. (*People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

However, defendant did move to dismiss both petitions on the ground the Department lacked authority to supervise him on parole. We conclude both motions lacked merit. Each petition to revoke parole alleged the Department's risk assessment tool had identified defendant as a high risk sex offender. One released on parole for "[a]ny crime for which the person is classified as a high-risk sex offender" is subject to supervision by the Department. (§ 3000.08, subd. (a)(4).) Further, section 3000.08, subdivision (l) provides "Any person released to parole supervision pursuant to subdivision (a) shall, regardless of any subsequent determination that the person should have been released pursuant to subdivision (b) [postrelease supervision under section 3450 et seq.], remain subject to subdivision (a) after having served 60 days under supervision pursuant to subdivision (a)." Defendant had been under the Department's supervision far beyond 60 days when the first petition to revoke his parole had been filed.

The postjudgment order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

IKOLA, J.

THOMPSON, J.